Supreme Court, U.S.
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No. 04- ____

In the Supreme Court of the United States

DANFINA HERMAN AND CALIN PANITI,
Petitioners,

v.

JOHN ASHCROFT, Attorney General; CAROL JENIFER, District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE, JOHN ASHCROFT, Attorney General,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Were Petitioners denied due process under the United States Constitution during their administrative immigration appeal process because the BIA did not correctly interpret and apply the NACARA statute?

TABLE OF CONTENTS

PAGE NO.

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF CASE 2

REASONS FOR GRANTING WRIT 6

I. PETITIONERS WERE DENIED DUE PROCESS UNDER THE UNITED STATES CONSTITUTION, AMENDMENTS V AND XIV, DURING THEIR ADMINISTRATIVE IMMIGRATION APPEAL PROCESS BECAUSE THE BIA DID NOT CORRECTLY INTERPRET AND APPLY THE NACARA STATUTE 8

A. GENERAL CONSTITUTIONAL PRINCIPLES 8

B. LEGAL DISCUSSION - STATUTORY INTERPRETATION 10

C. CONCLUSION 15

RELIEF REQUESTED 16

APPENDIX

Appendix A - Sixth Circuit Order - 6/21/04 . . . . . 1a

Appendix B - BIA Decision - 9/18/02 . . . . . 7a

Appendix C - Oral Decision of the Immigration Judge - 1/5/99 . . . . . 11a

Appendix D - Order of the Immigration Judge - 1/5/99 . . . . . 24a

Appendix E - Petitioner's Sixth Circuit Brief Excerpts 26a

TABLE OF AUTHORITIES

CASES **PAGE NO.**

Babai v. INS, 985 F.2d 252 (6th Cir. 1993) 14

Barber v. Gonzales, 347 U.S. 637 (1954) 13

Blackledge v. Perry, 417 US 21, 94 S Ct 209, 40 L Ed 2d 628 (1974) 8

Chevron U.S.A.v. Natural Resources Defense Counsel, Inc. 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) 10, 11

Columbus v. Penick, 443 US 449, 99 S Ct 2941, 61 L Ed 2d 666 (1979). 8

Delgadillo v. Carmichael, 332 U.S. 388 (1947) . . . 13

Fieran v. INS, 268 F.3d 340 (6th Cir. 2001) 7

Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S.Ct.374, 92 L.Ed. 433 (1948) 12

Griffith v. Kentucky, 479 US 314, 107 S Ct 708, 93 L Ed 2d 649 (1987). 8

Henderson v. INS, 157 F. 3d 106 (2d Cir. 1998) . . 11

Hernandez-Patina v. INS, 831 F.2d 750 (7th Cir.1987) 14

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 11

INS v. St. Cyr, 533 U.S. 289; _____S. Ct._____; _____L.Ed. 2d _____(2001) 11

Kalaw v. INS, 133 F 3d 1147 (9th Cir. 1997) 6

Ladha v. INS, 215 F. 3d 889 (9th Cir. 2000) 10

Matter of Burbano, 20 I&N 872 (BIA 1994) 14

Matter of Nolasco, 22 I.& N. Dec. 632 (BIA 1999) 12

Matter of Torres, 19 I&N 371 . . . . . 4, 12

Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976) 9

Mustata v. United States Department of Justice, 179 F.3d. 1017 (6th Cir. 1999) 7

Niam v. Ashcroft, 354 F. 3d 652 (7th Cir. 2004) . . 15

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 121 S.Ct. 2271, ___L.Ed. 2d ____ (1977) 7

Samtans-Figueroa v. INS, 644 F. 2d 1354 (9th Cir. 1981) 14

Sharma v. INS, 89 F. 3d 545 (9th Cir. 1996) 6

Shaughnessy v. United States ex. Rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953) 9

Sherifi v. INS, 260 F.3d 737 (7th Cir. 2001) 6, 7

United States v. Weathers, 186 F. 3d 948 12 (D.C. Cir. 1999) 15

Yue Yu (a/k/a/Yu Yue) v. Brown, 92 F. Supp. 2d 1236 (D. NM 2000) 11

Zahedi v. INS, 222 F.3d 1157 (9th Cir. 2000). 10

Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 150 L Ed. 2d 653 (2001). 15

CONSTITUTION

US Const Amendment V 1, 8, 9
US Const Amendment XIV 1, 8

STATUTES

28 USC § 1254(1). 1
IIRIRA 6
Immigration and Nationality Act § 240A 3, 4, 12
NACARA . . . . . *Passim*
8 C.F.R. § 245.3(a)(2) 2

OTHER AUTHORITY

Bryan G. Slocum, *The Immigration Rule of Lenity and Chevron Deference,* 17 Geo. Immigr. L.J. 515 (Summer, 2003) 11

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals opinion is unpublished and is attached in the Appendix. The order is dated June 21, 2004.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US Const Amendment XIV provides:

> Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Danfina Herman, a citizen of Romania, first entered the United States in January, 1988, after obtaining a visa to visit her brother, a United States citizen. She filed for asylum during that visit, but abandoned that effort when her son, Calin Paniti, got sick. Petitioner obtained a second visa to visit the United States in April, 1990 and applied for exclusion from deportation in the form of asylum at that time, pursuant to Section 244(a) of the Act. In 1993, while the asylum application was pending, Petitioner requested eight weeks of advanced parole from the Immigration and Naturalization Service ("INS"). She entered the United States with her son, Calin Paniti. The parole was terminated, resulting in exclusion proceedings for Petitioner and her son. *See* Oral Decision of Immigration Judge, File Nos. A 29-444-809; A 72-687-350, January 5, 1999, 2-6 ("Oral Decision").

In reviewing this case, the Sixth Circuit observed:

> The INS informed Herman that advance parole would permit her to resume her asylum application upon her return to the United States. However, it warned her that pursuant to 8 C.F.R. § 245.3(a)(2), should her asylum application be denied, she would be subject to exclusion proceedings.

See Order ("Order"), No. 02-4111, Sixth Circuit Court of Appeals, 6/21/04, 1.

The Court noted that Petitioner returned to Romania during the period of advance parole and returned to the United

States on September 17, 1993. On November 26, 1996, Petitioner was informed that her parole was terminated due to the denial of the asylum request.

Herman was advised that she did not appear entitled to enter the United States because she appeared to be an immigrant whose parole status had been canceled, and that she was not in possession of a valid unexpired immigrant visa or other valid entry document, and was not exempt from the presentation thereof. Accordingly, Herman was placed in exclusion proceedings. After a hearing before an immigration judge, Herman and Paniti conceded excludability and deportability. After Herman and Paniti declined to designate a country for exclusion and deportation the IJ designated Romania. Herman requested asylum and suspension of deportation and listed Paniti as a derivative applicant for relief. *Id.*, 2.

Herman and Paniti's requests and applications for asylum were denied. The immigration judge decided that Herman had not demonstrated past persecution. She also had not demonstrated a well-founded fear of future persecution. However, the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193, sec. 203(a)(5)(C)(i) provides for suspension of deportation as follows:

> (C) Special rule for certain aliens granted temporary protection from deportation.
>
> (I) IN GENERAL.–for purposes of calculating the period of continuous physical presence under section 244(a) of the Immigration and Nationality Act (as in effect before the title III-A effective date) or section 240A of such Act (as in effect after the title III-A

> effective date), subparagraph (a) of this paragraph and paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act shall not apply in the case of an alien, regardless of whether the alien is in exclusion or deportation proceedings before the title III-A effective date, who has not been convicted at any time of an aggravated felony (as defined in section 101(a) of the Immigration and Nationality Act) and...

The immigration judge agreed that "on the surface, it would appear that an application for suspension of deportation in an exclusion case would not be applicable, citing Matter of Torres, 19 I&N 371." However, he continued his analysis by observing:

> ... with the passage of the Nicaraguan Adjustment and Central American Relief Act (NACARA), it would appear to this Court that applicant (sic) is eligible to apply for suspension of deportation while in exclusion proceedings. And in particular, Section 203(a)(5)(C)(i) provides, "regardless of whether the alien is in exclusion or deportation proceedings." This phrase is taken out of context only to the extent that the other language not cited is not dispositive, merely descriptive. At a reading of Section 203, it would appear to this Court that Congress has authorized those who fit within the definition to apply for this new form of relief. And as cited above in that provision, this would apply regardless of whether the alien is in exclusion or deportation proceedings. And, as such, her eligibility is determined by whether she has the seven years of physical presence immediately preceding her application, is a person of good moral character, and that her exclusion would result in extreme hardship to herself, her United States

citizen or lawful permanent resident spouse, child, or parent. *Id.*, 8.

The immigration judge then went on to find that Petitioner meets the criteria for suspension of deportation under NACARA, specifically, seven years of physical presence immediately preceding the application, being a person of good moral character, and that, when factors presented on the record are considered in an aggregate fashion, exclusion would result in extreme hardship to herself, her United States citizen or lawful permanent resident spouse, child or parent; the application for suspension of deportation was granted pursuant to the above analysis. *Id.*, 8-15.

In the Appeal taken by Immigration and Naturalization Service ("INS") to the Board of Immigration Appeals ("BIA"), the INS asserted that Appellee Danfina Herman ("Herman") had not established an extreme hardship. It also held there was an issue as to whether Calin Paniti ("Paniti") was not statutorily eligible as he had not been in the United States for seven years before the filing of his Order to Show Cause, failed to demonstrate extreme hardship, and failed to file an application for suspension of deportation. The Board of Immigration Appeals (reversed the immigration judge's decision and vacated the order allowing Herman's suspension of deportation and Paniti's suspension as a derivative beneficiary. The date of the BIA decision was September 18, 2002. The BIA's reasoning was that the form of relief, suspension of deportation, as granted by the immigration judge, is not available to aliens who are in exclusion proceedings. Because of the determination that Herman was not eligible for suspension of deportation, the BIA determined that Paniti's suspension of deportation through his derivative status was also not valid.

The Sixth Circuit denied relief in an unpublished order dated July 21, 2004. The Court held that an argument identical to Petitioners' had been decided in favor of the INS, citing Sherifi v. INS, 260 F.3d 737 (7th Cir. 2001). In so deciding, the Seventh Circuit observed that "nothing in NACARA changed the well-established rule that aliens in exclusion proceedings are not entitled to suspension of deportation." *See,* Order, 3-4. The Sixth Circuit further observed that the Sherifi panel determined that the language at issue refers to the "stop time rule" created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-5465. *Id.* The language of the two statutes cannot be read in isolation because, in the Sixth Circuit panel's view, IIRIRA applies to this petition because the administrative proceeding in the instant case was commenced before April 1, 1997, and the BIA's finding was issued after October 31, 1996, citing Kalaw v. INS, 133 F 3d 1147, 1149-50 (9th Cir. 1997). *Id.* Accordingly, the BIA's factual findings were held to be reviewed under the standard of substantial evidence. *See* Sharma v. INS, 89 F. 3d 545, 547 (9th Cir. 1996). Accordingly, the panel found that Petitioner's reliance on NACARA, sec. 203(a)(1), which changes the transitional rules for suspension of deportation by implementing a special rule for calculating the period of continuous physical presence for certain aliens granted temporary protection from deportation, is misplaced. *Id.* Petitioners now seek a writ of certiorari from the Sixth Circuit's decision to affirm the BIA's decision, so that the United States Supreme Court can conduct a complete review of this question.

REASONS FOR GRANTING WRIT

Petitioners urge this Court to grant *certiorari* to determine whether the language of NACARA indicates that Petitioners

should have their deportation or exclusion suspended. As was argued to the Sixth Circuit, suspension of deportation or removal under the Nicaraguan Adjustment and Central American Relief Act ("NACARA") requires: possession of citizenship from certain delineated countries, continuous presence in the United States for seven years before service of a charging document, a good moral character and resultant extreme hardship if the individual is forced to return to his or her native country. The issue is one which turns on the statutory interpretation of NACARA's language, i.e., "*regardless of whether the alien is in exclusion or deportation proceedings*".

Because of the potential harm to others in similar circumstances, the Court should, in its wisdom, grant review concerning the above language. Additionally, Petitioner submits that this question should be reviewed *de novo.* Mustata v. United States Department of Justice, 179 F.3d. 1017 (6th Cir. 1999). Although the issue has not been resolved in favor of Petitioners, the frequency of presentation throughout the federal courts indicates this issue and similar issues will be litigated repeatedly in the foreseeable future.[1] *See, e.g.,* Sherifi v. INS, 260 F.3d 737 (7th Cir. 2001)[concerning applicability of section 203 of NACARA]; Fieran v. INS, 268 F.3d 340 (6th Cir. 2001). The exact issue presented here, that of interpretation of the above language in the statute, (and the enormous potential for conflict between

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[1] The question of statutory interpretation of administrative immigration law by the agency needs to be revisted by this Court. Requirements for judicial deference to the agency are not at all clear, and decisions go in both the direction of deference and in the direction of free judicial substitution of judgment. *See,* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249; 121 S.Ct. 2271; ___L.Ed. 2d ____(1977).

governing immigration rules of interpretation) requires careful review.

I. PETITIONERS WERE DENIED DUE PROCESS UNDER THE UNITED STATES CONSTITUTION, AMENDMENTS V AND XIV, DURING THEIR ADMINISTRATIVE IMMIGRATION APPEAL PROCESS BECAUSE THE BIA DID NOT CORRECTLY INTERPRET AND APPLY THE NACARA STATUTE

The question in this case is not simply whether the individual Petitioners should be deported. It is, rather, whether the process employed by the BIA to make the determination that Petitioners should be forced to leave the United States even marginally met due process requirements. Petitioners submit that the agency's actions do not, for the following reasons.

A. General Constitutional Principles.

The constitutional dictates of due process protections are not limited to legislative discrimination, but apply to all official state actions. Columbus v. Penick, 443 US 449, 99 S Ct 2941, 61 L Ed 2d 666 (1979). Specifically, the right of access to the courts is protected as a fundamental right under the Fourteenth Amendment to the United States Constitution. Once a state establishes an avenue of appellate review for criminal defendants, "'it is now fundamental that, **once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.**'" Blackledge v. Perry, 417 US 21, 94 S Ct 209, 40 L Ed 2d 628, 633, n.1 (1974)[other cites omitted, emphasis added]. A corollary principle was enunciated in Griffith v. Kentucky, 479 US 314, 322-24, 107 S Ct 708,

713, 93 L Ed 2d 649 (1987). There, the US Supreme Court addressed the problem of unequal treatment of criminal defendants in similar circumstances. The Court adopted what has been referred to as "the equality principle". That is, simply, that "similarly situated litigants should be treated the same" and have equal, meaningful access to the courts.

In the administrative agency context, these principles still apply. In Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976), this Court considered the extent to which administrative Social Security procedures violated due process requirements. The Court observed that due process requires a balanced consideration of the private interests that will be affected, the risk of erroneous deprivation of such an interest through procedures used, the probable value, if any, of additional safeguards, and the Government's interest. 96 S. Ct. 893, 903.

The high courts have specifically mandated that the immigration courts observe Fifth Amendment due process guarantees. In Shaughnessy v. United States ex. Rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 629, 97 L.Ed. 956 (1953), this Court instructed that due process was owed to those persons present in the United States, even if they entered illegally. The Court also distinguished between those already here and those trying to enter for the first time:

> ...aliens *who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.* ...But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' (Cites omitted, emphasis added.)

Specifically, due process guarantees apply in phases of proceedings such as presentation of evidence, to the extent necessary to insure a full and fair hearing. *See* Ladha v. INS, 215 F. 3d 889, 904 (9th Cir. 2000); Zahedi v. INS, 222 F.3d 1157, 1164-1166 (9th Cir. 2000). A critical part of a full and fair hearing is the reasoning of the decision-making body, which may be subject to further appellate review. If there is no reasoning or factual analysis made available, than there is no opportunity for a meaningful appeal at the next level.

B. Legal Discussion- Statutory Interpretation.

The issue before this court is purely one of statutory construction concerning an agency's interpretation of statutory authority. Under Chevron U.S.A.v. Natural Resources Defense Counsel, Inc. 467 U.S. 837, 842-844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), a court engaged in judicial review of an agency's interpretation of a controlling statute must first look to see whether the language is clear and unambiguous as to legislative intent. If, after employing traditional rules of statutory construction, the court finds unambiguous legislative intent, that intent must be given effect. Deference to the agency is not required at this point. If, on the other hand, the intent is not clear, and where the agency has particular expertise, the agency interpretation

should be deferred to by the court in many cases.[2] *See,* INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).

In the instant case, the section of the statute which the immigration judge relied upon stated clearly that suspension of deportation is available by application, *regardless of whether the applicant is in exclusion or deportation proceedings*. Here, the language of the statute is clear and unambiguous. It allows for suspension of deportation regardless of exclusion or deportation proceedings. There is no need for agency expertise to interpret the meaning of the above language, or of the legislative intent behind it. *See* Henderson v. INS, 157 F. 3d 106, 130 (2d Cir. 1998) [no deference to an agency interpretation need be given where the meaning of a statute is clear]; Yue Yu (a/k/a/Yu Yue) et. al., v. Douglas Brown, et. al., 92 F. Supp. 2d 1236 (D. NM, 2000).

The judge proceeded to evaluate the established factors, and found that Petitioner met the criteria. The fact that the BIA held otherwise is of no import, because the clarity of the

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[2] A co-existing rule of statutory construction is the immigration rule of lenity. This rule directs that ambiguities in deportation statutes be resolved in favor of the alien or noncitizen. In spite of the judicial deference given to agencies in immigration litigation, the immigration rule of lenity is viable and operative. In a cogent article, author Bryan G. Slocum discusses the immigration rule of lenity as it exists concomitantly with the Chevron deference doctrine. *See,* Bryan G. Slocum, *The Immigration Rule of Lenity and Chevron Deference,* 17 Geo. Immigr. L.J. 515, 517-519 (Summer, 2003). Slocum observes that the viability of the rule of lenity is clear, as evidenced by the United States Supreme application of same in INS v. St. Cyr, 533 U.S. 289; _____S. Ct._____; _____L.Ed. 2d _____(2001).

statutory language negated the need for further interpretation by a reviewing administrative or judicial body. As Petitioner noted for the Sixth Circuit, the Torres, case, *supra*, is pre-NACARA. Since it is "presumed that Congress is aware of case law when it enacts a new statute and if it is contradictory, it is presumed to have intended to change the law", Torres is not applicable or relevant here. Petitioner's Final Brief in the Sixth Circuit Court of Appeals ("Six Circuit Brief:), Case No. 02-4111, 10-11.

However, even if this Court were to hold that there is ambiguity in the language of the statute, the rule of immigration lenity would apply and allow for relief. As Petitioner argued in the Sixth Circuit, that the NACARA is "a law which combined exclusion and deportation proceedings into a single action of removal. This was, inter alia, to eliminate the double standards regarding aliens facing proceedings which could result in their being forcefully ejected from the United States...As two forms of proceedings were being combined, Congress chose to express eligibility for suspension of deportation under the transitional rules through the key phrase "'regardless of whether the alien is in exclusion or deportation proceedings'" found at NACARA Section 203(a)(5)(C)(i)." *Id.*, 16. *See. also,* Matter of Nolasco, 22 I.& N. Dec. 632 (BIA 1999)[determination that stop-time rule of section 240A of the Immigration and Naturalization Act apply to deportation and removal cases, both].

In Fong Haw Tan v. Phelan, 333 U.S. 6, 10; 68 S.Ct.374; 92 L.Ed. 433, the United States Supreme Court agreed that, particularly in situations where the applicable law is not punitive the immigration rule of lenity should apply:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. *Id.*, 333 U.S. 6, 10.
>
> *See also* Barber v. Gonzales, 347 U.S. 637, 642-643. The 1957 Act...was intended accomplish a humanitarian result. We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens...

As noted above, the statute at issue is not, and was not intended to be, a punitive law. Instead, it was meant to be remedial in nature and should not be construed punitively against Petitioners or others in like situations. Accordingly, the immigration judge deciding the case at the first administrative level was correct. Petitioner submits that the determination of the immigration judge, which was made more than 4 months prior to the issuance of 64 FR 98, page 27855, as to whether he was empowered to order suspension of deportation is controlling and mandates reversal of the Sixth Circuit.

Claims as they relate to Calin Paniti. It is uncontroverted that Paniti's status is derivative relative to Herman's. Thus,

the error in application and interpretation of NACARA as it relates to Herman forms the basis for Paniti's claim, because he is denied suspension of deportation under the same analysis due to his derivative status.

Extreme Hardship. Finally, for purposes of completeness, Danfina Herman asserts that the extreme hardship criteria has been decided wrongly as to her immigration status. The INS's finding of Petitioner Herman's credibility should have been given great deference. See Matter of Burbano, 20 I&N 872 (BIA 1994).

It is axiomatic that the factors to determine extreme hardship must be considered in their aggregate totality, not on an individual basis, to arrive at a determination. Babai v. INS, 985 F.2d 252 (6th Cir. 1993). Even if factors are not "extreme" in their individual capacities, they may be extreme when considered together as aggregate factors. Hernandez-Patina v. INS, 831 F.2d 750, 752 (7th Cir.1987).

Petitioner's emotional and psychological hardship upon leaving the United States must also be considered. Extreme hardship may result from "the combined effect of depriving the petitioner of his livelihood and uprooting him from a community to which he belonged and contributed for more than a decade." Samtans-Figueroa v. INS, 644 F. 2d 1354, 1357 (9th Cir. 1981).

This Court has consistently stated that due process requirements apply to immigration proceedings. Decisions by the circuits which flout this basic principle need to be reviewed by the highest court in the land. A review of recent administrative decisions on the issue in the case at bar would indicate this to be necessary. Even the circuits have noted that immigration decisions are, lately, inconsistent and

violative of primary constitutional principles. The Seventh Circuit, Posner, J., recently commented that a review of BIA decisions suggests "a pattern of serious misapplications by the board and the immigrations judges of elementary principles of adjudication '...The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this and other cases.'" Niam v. Ashcroft, 354 F. 3d 652, 653 (7th Cir. 2004). (Cites omitted).

Further, the United States Supreme Court has held that persons who have attained residence in the United States have an even greater claim to being allowed to remain unless they are subject to proceedings genuinely meeting constitutional due process requirements. Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 2515, 150 L Ed. 2d 653 (2001). This is the appropriate time for the United States Supreme Court to address the new immigration provisions in light of constitutional policy concerns. Addressing these issues now will accomplish preemption of an extraordinary amount of litigation which will surely develop as asylum is summarily denied to countless deserving individuals. Given the high level of national security concern, immigration proceedings aimed at removal of non-citizens, no matter what the constitutional cost, seems already a force in motion.

C. Conclusion.

This Court's constitutional mandates regarding Petitioner's case are axiomatic. Lower court cases interpreting the applicable law do not alter long-standing Supreme Court precedent. United States v. Weathers, 186 F. 3d 948, 957 n. 12 (D.C. Cir. 1999). Further, lower federal courts have no authority to interpret newer Supreme Court authority as altering or overruling older precedent without a clearly stated mandated from the highest court in the country.

Following from the well-established authority requiring reasoned and fair decision-making in deportation and removal proceedings, Petitioners respectfully ask this Court to grant a writ of certiorari in order to speak to this crucial question. Petitioners ultimately request a remand for the BIA to reconsider their case applying proper substantive and procedural tenets.

RELIEF REQUESTED

Following from the mandate and well-established authority requiring reasoned and fair decision-making in deportation and removal proceedings, Petitioners respectfully ask this Court to grant a writ of certiorari in order to speak to this crucial question. Petitioners ultimately request a remand for the BIA to reconsider their case applying correctly interpreted and applied administrative standards.

Respectfully Submitted,

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Date: September 13, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-4111

[Filed June 21, 2004]

DANFINA HERMAN;	)
CALIN PANITI,	)
Petitioners,	)
	)
v.	)
	)
JOHN ASHCROFT, Attorney General,	)
Respondent.	)
	)

On Appeal From
Board of Immigration Appeals
A29 444 809
A72 687 350
September 18, 2002

Before: DAUGHTREY, GIBBONS, and COOK, Circuit Judges

ORDER

Danfina Herman and her minor son, Calin Paniti, petition for judicial review of an order of the Board of Immigration Appeals (BIA), which denied Herman's request for suspension of deportation and held that Paniti was ineligible for suspension of exclusion proceedings as a derivative beneficiary of Herman's request for relief. The patties have waived oral argument and the panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

Herman first entered the United States in 1988, and applied for asylum. However, one month later, she returned to Romania, where she remained until 1990. She then obtained a visitor's visa and re-entered the United States and again applied for asylum. While her asylum application was pending, she requested, and was granted, eight weeks of advance parole from the Immigration and Naturalization Service (INS).

The INS informed Herman that advance parole would permit her to resume her asylum application upon her return to the United States. However, it warned her that pursuant to 8 C.F.R. § 245.3(a)(2), should her asylum application be denied, she would be subject to exclusion proceedings.

During her period of advance parole, Herman returned to Romania and subsequently reentered the United States on September 17, 1993, with her son. Paniti, who entered the United States on a visitor's visa, remained. Paniti subsequently overstayed his visa, resulting in the commencement of deportation proceedings against him on June 11, 1996.

On November 26, 1996, the INS notified Herman that it had terminated her parole based on the denial of her asylum application. The INS served Herman with a "Notice to Applicant for Admission Detained for Hearing Before Immigration Judge." Herman was advised that she did not appear entitled to enter the United States because she appeared to be an immigrant whose parole status had been cancelled, and that she was not in possession of a valid unexpired immigrant visa or other valid entry document, and was not exempt from the presentation thereof. Accordingly, Herman was placed in exclusion proceedings.

At a hearing before an immigration judge (IJ), Herman and Paniti admitted the factual allegations and conceded excludability and deportability. After Herman and Paniti declined to designate a country for exclusion and deportation the IJ designated Romania. Herman requested asylum and suspension of deportation and listed Paniti as a derivative applicant for relief.

After a hearing, the IJ denied the applications for asylum and withholding of deportation. The IJ concluded that Herman and Paniti failed to demonstrate past persecution or a well-founded fear of future persecution in Romania. However, the IJ granted Herman suspension of deportation pursuant to § 203(a) of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193, and granted Paniti suspension as the derivative beneficiary of Herman's application for relief pursuant to NACARA § 203(a)(5)(C)(i)(IV). The IJ held that the phrase "whether the alien is in exclusion or deportation proceedings" in § 203(a) of NACARA indicated that suspension of deportation is available to aliens, such as Herman, who are in exclusion proceedings. After determining that Herman was otherwise

statutorily eligible, the IJ granted her suspension of deportation. The INS filed a timely notice of appeal with the BIA.

On September 18, 2002, the BIA vacated the IJ's order granting suspension of deportation, ordered Herman excluded, and ordered Paniti deported. The BIA found that the IJ erred in granting Herman's request for suspension of deportation because this form of relief is not available to aliens who are in exclusion proceedings. The BIA specifically found that "[t]he regulations implementing NACARA explain that suspension of deportation is not a form of relief available in exclusion proceedings." After the BIA determined that Herman was statutorily ineligible for suspension of deportation as an alien placed in exclusion proceedings prior to April 1, 1997, the BIA held that Paniti was ineligible for suspension as the derivative beneficiary of Herman's request for relief. Herman and Paniti now seek this court's review of the BIA's decision.

Herman and Paniti have abandoned their arguments that: 1) the BIA violated their due process and equal protection rights based upon the procedural change to the number of administrative judges reviewing their appeal, and 2) the standard of review undertaken by the BIA violated their due process and equal protection rights.

The transitional rules for judicial review under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, apply to this petition because administrative proceeding was commenced before April 1, 1997, and the BIA's order was issued after October 31, 1996. *See Kalaw v. INS*, 133 F.3d 1147, 1149-50 (9th Cir. 1997). Under these rules, the BIA's

factual findings are reviewed under the substantial evidence standard. *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996).

Herman's reliance on NACARA § 203(a) is misplaced. Prior to the adoption of IIRIRA, excludable aliens were not eligible for suspension of deportation. After the passage of IIRIRA, Congress passed NACARA on November 19, 1997, which amended IIRIRA. Among other amendments, NACARA § 203(a) changed the transitional rules for suspension of deportation by implementing a special rule for calculating the period of continuous physical presence for certain aliens granted temporary protection from deportation. NACARA § 203(a)(1), 111 Stat. 2160, 2196-98.

Herman asserts that the passage of NACARA renders her eligible to apply for suspension of deportation. She claims that the phrase "regardless of whether the alien is in exclusion or deportation proceedings," NACARA § 203(a) is evidence that Congress intended to permit aliens in exclusion proceedings to apply for suspension of deportation.

NACARA did not make aliens in exclusion proceedings eligible for suspension of deportation. The provision is limited in application to the calculation of continuous physical presence. The new post-IIRIRA rules for continuous physical presence do not apply to certain aliens granted temporary protection from deportation. Rather, the old, pre-IIRIRA continuous physical presence rules apply. The BIA did not deny Herman suspension of deportation because she failed to meet the continuous physical presence requirement. Rather, the BIA denied this form of relief because suspension of deportation is not available to Herman as an excludable alien.

The Seventh Circuit has considered and rejected the identical argument that Herman raises. *See Sherifi v. INS*,

737, 742(7th Cir.2001) (holding that "[n]othing in NACARA changed the well-established rule that aliens in exclusion proceedings are not entitled to suspension of deportation."). In *Sherifi*, the court reviewed the language at issue and determined that the provision relates to the "stop time" rule created by IIRIRA and that it "cannot be read in isolation. It merely suspends operation of the stop time rule for certain aliens. Indeed, by its own terms, it is limited to the purpose of calculating the period of continuous physical presence in the United States." *Id.* at 741-42. Moreover, the court concluded that while there is a purpose for the specific language at issue in the NACARA provisions, it is "not to create a remedy of suspension of deportation for persons in exclusion proceedings, but rather to allow certain aliens to begin their proceedings anew without being subject to the stop time rule." *Id.* At 742.

Despite Herman's argument on appeal, as an alien in exclusion proceedings, she is not eligible for suspension of deportation. *See Fiernan v. INS*, 268 F.3d 340, 344 (6th Cir. 2001). Because Herman is ineligible for suspension of exclusion as the derivative beneficiary of her suspension claim.

Accordingly, the petition for judicial review is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A29 444 809 - Detroit Date: Sept. 18, 2002
A72 687 350

In re: DANFINA HERMAN
CALIN PANITI

IN EXCLUSION AND DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT AND RESPONDENT: Carl M. Weideman III, Esquire

ON BEHALF OF SERVICE: Rosario S. Shoudy
Assistant District Counsel

EXCLUDABLE: Sec.212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - No valid immigrant visa (A29 444 809)

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - In the United States in violation of law (A72 687 350)

APPLICATION: Suspension of deportation

In a decision dated January 5, 1999, an Immigration Judge found the applicant excludable as charged and the respondent deportable as charged. The Immigration Judge denied the applicant's and the respondent's requests for asylum and withholding of exclusion. However, the Immigration Judge granted the applicant's request for suspension of deportation pursuant to section 203 of the Nicaraguan and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193, 2196 ("NACARA"), *amended by* Pub. L. No. 105-139, 111 Stat. 2644. The Immigration Judge also granted the respondent's request for suspension of deportation pursuant to section 203 of NACARA. The Immigration and Naturalization Service ("Service") appealed the Immigration Judge's grant of suspension of deportation. The applicant and respondent did not appeal the Immigration Judge's denial of asylum and withholding of exclusion and deportation.

On appeal, the Service contends that the Immigration Judge erred in granting suspension of deportation to an alien in exclusion proceedings. The Service further argues that the respondent was not statutorily eligible for a grant of suspension of deportation as the dependent of an alien of a NACARA suspension of deportation.

We find that the Immigration Judge erred in granting the applicant's request for suspension of deportation. Suspension of deportation is a form of relief which is not available in exclusion proceedings. *Matter of G-A-C-*, 22 I&N Dec. 83 (BIA 1998) (regarding suspension of deportation in exclusion proceedings); *Matter of Torres,* 19 I&N Dec. 371 (BIA 1986) (same). The regulations implementing NACARA explain that suspension of deportation is not a form of relief available in exclusion proceedings. *See* 64 FR 27856, 27859-60

(regarding NACARA suspension of deportation and exclusion proceedings). "Contrary to showing a congressional intent that NACARA relief be made available to persons in exclusion proceedings, the phrase [regardless of whether the alien is in exclusion or deportations proceedings] indicates that Congress did not want the new continuous residence and physical presence rules to apply for NACARA beneficiaries who are eligible to apply for suspension of deportation or cancellation of removal no matter what charging documents." *See* 64 FR 27856, at 27860. The comments also indicate that "none of [the] transitional rules dealing with suspension of deportation override the general transitional rule that subjects a person placed into exclusion proceedings prior to April 1, 1997, to the rules governing exclusion that were in place before IIRIRA was enacted." *Id.*

Therefore, the Service's appeal of the Immigration Judge's grant of suspension of deportation to the applicant is sustained. As the applicant is ineligible for a grant of NACARA suspension of deportation, the respondent is not eligible for a grant of NACARA suspension of deportation pursuant to section 203(a)(5)(C)(iii). Accordingly, the Service's appeal of the Immigration Judge's grant of suspension of deportation to the respondent is also sustained.

ORDER: The Service's appeal is sustained.

FURTHER ORDER: The Immigration Judge's order granting the applicant's request for suspension of deportation pursuant to section 203 of NACARA is vacated.

FURTHER ORDER: The Immigration Judge's order granting the respondent's request for suspension of deportation pursuant to section 203(a)(5)(C)(iii) is vacated.

FURTHER ORDER: The applicant is ordered excluded and deported to Romania.

FURTHER ORDER: In lieu of an order of deportation, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director.

FURTHER ORDER: In the event that the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective; the respondent shall be deported from the United States on to Argentina on the charges contained in the Order to Show Cause.

/s/_____
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Detroit, Michigan

File No.:A 29 444 809
A 72 687 350

[Filed January 5, 1999]

In the Matter of	)
HERMAN, DANFINA	)
PANITI, CALIN	)
Applicant/Respondent	)
	)

IN EXCLUSION PROCEEDINGS
IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(7)(A)(i) of the Immigration and Nationality Act - parole status is terminated, not in possession of valid entry documents; section 241(a)(i)(B) of the Immigration and Nationality Act - remained longer than permitted.

APPLICATIONS: Asylum; withholding of deportation; suspension of deportation (NACARA); voluntary departure.

ON BEHALF OF APPLICANT/RESPONDENT:

Carl Weideman

ON BEHALF OF SERVICE:

Rosario Saavedra

ORAL DECISION OF THE IMMIGRATION JUDGE

The applicant is a 39-year old single female, native and citizen of Romania. The corespondent is her son, Calin, who is a 19-year-old single male, native and citizen of Romania. The United States Immigration and Naturalization Service brought these proceedings pursuant to the authority contained in the Immigration and Nationality Act. Proceedings were commenced with the filing of the I-122 against the lead applicant with the Immigration Court on December 19, 1996 (Exhibit 1), and the filing of the Notice to Appear against the correspondent with the Immigration Court on July 15, 1996 (Exhibit l-A).

Both the applicant and the respondent admitted as alleged in the I-122, with respect to the lead applicant, and with respect to the corespondent, the allegations in the Notice to Appear, and conceded removability.

On the basis of these admissions, the Court does find that applicant's excludability and respondent's removability have been established by evidence which is clear, unequivocal, and convincing.

The applicant declined to designate a country of deportation. Romania was directed.

The applicant applied for relief from exclusion in the form of asylum, and her application shall as well be considered as an application for withholding of deportation. And she listed the respondent, her son, as derivative of her asylum application. The I-589 application for asylum documents are contained in the record marked as Exhibit 2. And prior to the admission, the applicant swore to me that, to the best of her knowledge and belief, the information contained therein is correct. The application was forwarded to the State Department for response, and the response is included as Exhibit 3. I have given significant weight to the State Department response in this case, also on underlying facts.

The evidence at the hearing consisted of the applicant and the respondent's testimony, the applicant's written application, the declaration attached to the application, her testimony, the testimony of a Simion Timbuc.

In her application, the applicant indicated she was seeking asylum on the grounds of religion and membership in a particular social group. She believes that if she returned to Romania, she would be further persecuted and possibly incarcerated. She did indicate in the application that members of her family had been arrested and detained, and in 1988 she departed Romania and traveled to the United States. She returned to Romania, and in 1990 she departed Romania again and entered the United States again where she remained until 1993. She was then paroled to return to Romania, which she did. She reentered the United States within five weeks with the respondent, her son, and her mother. That parole was terminated, resulting in her being placed in exclusion proceedings. Her son, Calin, overstayed his visitor's visa, resulting in being placed in removal proceedings.

Relative to their asylum application, she testified substantially as follows. The applicant indicated that she was born in Romania in 1959. All her family are members of the Pentecostal Church and, as such, received fairly harsh treatment from those in the government and non-Pentecostals within her country. She describes this treatment as including interference with their services. She believesthese people were members of the Orthodox Church. They were not acting necessarily under state sponsorship, but nonetheless were acting out what they believed to be proper in terms of impeding their ability to worship. She indicated that her father had been beaten on numerous occasions, and that while she went to school she had been beaten as well by teachers and taunted by the other students. Because of her status as a Pentecostal, she was allowed to attend the village school, which only extended to the 10th grade, but she was not allowed to go to the city school for further study beyond. She did, however, manage to get enrolled in a vocational school which she attended for approximately a year and a half.

She indicates as well that she married a Hungarian gentleman, and from this marriage she suffered various difficulties with both communities, the Hungarian and Romanian communities, that would not accept this intermarriage. In 1979 the respondent, Calin, was born of this marriage. And her son indicates as well that when he was attending school, he was harassed by various students and teachers because of both his belief in the Pentecostal Church and his dual heritage of having a Romanian mother and a Hungarian father. The marriage appeared not to have worked out. In 1983 a divorce occurred between the applicant and her Hungarian husband. The divorce decree indicates it was for brutal treatment and for desertion. She indicates that even after the divorce occurred, she was not treated well by her inability to obtain rations, her treatment that she believes she

was considered a second-class citizen because of her prior marriage to a Hungarian, she was unable to obtain an apartment which she believes she rated because of her son.

In 1988 she departed Romania, entered the United States, within 24 hours applied for asylum. She, however, returned a month later to Romania where she remained until 1990. She reentered the United States again on a visitor's visa and again applied for asylum. The application that was filed in 1988 was apparently lost. She left her son in a smaller apartment in the care of her brother who was in Romania. And while she had left in 1990, the son and brother were evicted from that apartment, which forced the son to live with another relative.

In 1993, because of an illness of her mother, she requested advance parole of the Immigration and Naturalization Service. A period of eight weeks was granted to her. She departed in August 13, 1993, for Romania, and she returned on September 17th with her mother and her son. Her mother remained in the United States for approximately two and a half months and returned to Romania. Her son, who entered the United States on a visa, overstayed that visa, resulting in his being placed in removal proceedings as an overstay. Applicant's advance parole was terminated, and she was placed in exclusion proceedings. She fears returning to Romania. She believes that she would not have religious freedom and, as well, would be discriminated because of her prior marriage to a Hungarian.

Statement of the Law

The burden is on the applicant to establish that she is eligible for asylum or withholding. And to qualify for withholding, she need show there is a clear probability her life or freedom would be threatened on account of race,

religion, nationality, membership in a particular social group, or political opinion. This means she must establish that it is more likely than not that she would be subject to persecution on one of the grounds specified.

To qualify for asylum, she need show that she fits within the definition of a refugee. This definition of refugee includes the requirement that the applicant demonstrate either that she suffered past persecution or that she has a well-founded fear of persecution in her country of nationality on account of her race, religion, nationality, membership in a particular social group, or political opinion. Thus, she must have a subjective fear of persecution, and that subjective fear must have an objective basis. Now, the objective basis has been described as the reasonable possibility of actually suffering such persecution if the alien were to return to her home country.

Credibility

In this particular case the Court has no difficulty with applicant's veracity. It is rather refreshing to have someone present a case in which issues of credibility are not tested.

Analysis and Findings

Even taking the facts as presented by the applicant in the best light, I do not find that she has established past persecution, nor do I find she has a well-founded fear of future persecution. In arriving at this decision, I do not believe that she has misled the Court or misstated facts. I do, however, find that those facts as stated to be true not to be of the severe nature to rise to the level of persecution as understood by this Court.

Alternatively, applicant requested relief from exclusion in the form of suspension of deportation pursuant to Section 244(a) of the Act. The applicant's form EOIR-40 application for suspension of deportation is contained in the record, marked as Exhibit 6. And prior to the admission of the application with supporting documents, applicant swore to me that, to the best of her knowledge and belief, the information contained therein is true. The evidence presented on behalf of the suspension application will be considered with the testimony that had previously been provided to this Court and additional testimony offered today by the applicant.

Statutory Eligibility

It would appear on the surface that an application for suspension of deportation in an exclusion case would not be applicable since in the Matter of Torres, 19 I&N 371, it is clear that a person faced with similar facts as in this case was denied the ability to apply for suspension of deportation after being placed in exclusion proceedings when that individual's parole was terminated.

However, with the passage of the Nicaraguan Adjustment and Central AmericanRelief Act (NACARA), it would appear to this Court that applicant is eligible to apply for suspension of deportation while in exclusion proceedings. And in particular, Section 203(a)(5)(C)(i) provides, "regardless of whether the alien is in exclusion or deportation proceedings." This phrase is taken out of context only to the extent that the other language not cited is not dispositive, merely descriptive. At a reading of Section 203, it would appear to this Court that Congress has authorized those who fit within the definition to apply for this new form of relief. And as cited above in that provision, this would apply regardless of whether the alien is in exclusion or deportation proceedings. And as such, her

eligibility is determined by whether she has the seven years of physical presence immediately preceding her application, is a person of good moral character, and that her exclusion would result in extreme hardship to herself, her United States citizen or lawful permanent resident spouse, child, or parent.

It would appear that the rules pursuant to a suspension of deportation pursuant to NACARA, other than the applicability to exclusion cases and a redefinition of the computation of physical presence, the other aspects of this relief remain unchanged.

As such, the elements to establish the extreme hardship are dependent upon the facts and circumstances that would be peculiar to each case. And relevant factors that have been found to be relevant to the issue are the alien's age, the length of residence in the United States, family ties in the United States and abroad, the health, economic and political conditions in the country to which they may be returned, financial status, occupation, the possibility of other means of adjustment, and other immigration history. Now, these relative factors in and of themselves individually need not be extreme. They are to be considered in the aggregate and, as such, a determination will be made whether the extreme hardship exists.

While political and economic conditions are relevant, they do not justify a grant of relief unless other factors such as age or a severe illness combined with these factors to make deportation extremely hard on the alien or qualifying relative. The Court does find that the applicant's application in 1990 for asylum establishes the starting point for physical presence, and must find as well that her application occurred after the lapse of seven years and, as such, does find the requisite seven-year period.

The issue of good moral character as well is satisfied. The applicant is of good moral character.

The issue of extreme hardship, however, merits some discussion in this case. Since in this case the applicant's eligibility is premised on hardship to herself, it does not appear that she has any other qualifying relative. And as such, the following factors have been considered in assessing whether extreme hardship exists. She has been here in the United States for approximately nine years. Her first entry was when she was age 30, not a child. She did, however, enter lawfully; she obtained visas. And it is interesting to the Court that when she did leave to assist her ill mother, she did so lawfully, first seeking and being granted advance parole in 1993 prior to her return, and she is currently now 39 years old.

The family in the United States consists of herself and the respondent in this case, her son, but she does have as well a brother and sister who are here in the United States. There is evidence that her brother is a U.S. citizen. The family outside the United States, however, is extensive. Her mother and father are there, she has two brothers and a sister who are there, she has four aunts and four uncles who are there, along with her grandmother.

Her health in this case is very good. She appears very healthy. There is no indication in the record or the testimony of any illness, nor of any illness currently to her son.

Her financial status in the United States appears rather secure. She owns real property, purchased a home in 1992 for $10,000 in cash which she estimates is currently worth approximately $50,000. She has a couple of automobiles that she owns and has additionally $14,000 or $15,000 worth of

cash and other investments along with an equal amount of household goods and effects. Her employment in the United States has been very stable and substantial. She has been consistent in her employment since 1994 with Textron. The Court believes that the gaps in her employment are not significant. Her earnings, the Court believes to be fairly significant, approximately $30,000. The evidence indicates she makes approximately $10 an hour and has the opportunity for overtime. In 1991, however, she did receive welfare for approximately two to three months of $150 each. She appears to have medical insurance at work. Important to the Court is the fact that she not only has filed her tax returns annually since her arrival in the United States, but she has paid those taxes due. And a review of those tax records appears to be that she has filed them accurately, not claiming deductions she is not otherwise entitled to. She works as a production operator, and the exact level for her skills were not explained to the Court, nor is there any evidence in the record of that, so it is difficult to assess whether these skills would be transferable to her home country.

The conditions in her home country, of course, can be considered. And the State Department report marked as Exhibit 4 describes the economic conditions in Romania as difficult economic conditions. And as well and important to this case to be considered are the country conditions. And in particular, those factors the Court believes are very significant in her case are the treatment of Pentecostals by those in the community or those residents in Romania, either as individuals or with the government. Her description of their mistreatment by members of the Orthodox Church in Romania is substantiated by the State Department report. In their "Profile" dated January 1997, the State Department stated that Pentecostal and other unregistered sects have had a difficult time and often did lead to mistreatment, and that there are

occasions where unsanctioned harassment by local officials impedes their worship. Thus, her testimony relative to interference by Orthodox and others as considered appears to be substantiated by the State Department report. Equally as well, the Court has considered the treatment that she has received as a Romanian who had married a Hungarian, and the hardship and discrimination which she has been forced to face because of that marriage, and the understanding that her son born of this marriage has been subject himself to that discrimination and her desire to have him raised in an environment free from that form of discrimination.

Additionally, the financial hardships that applicant would face, in the Court's estimate, would be significant. And the questions in this case are not merely the money since she does have a good job, a good house, she has a car. One could describe a rather typical middle-class American existence, but the Court does find significant that she has ingrained herself so well within the American community and would find the ability to replace this unsupported virtually impossible. And though considerations of loss of standard of living in and of itself would not rise to an extreme hardship, it is certainly a factor that must be considered.

There does appear, however, another factor that she may be eligible for adjustment based on a petition filed by her brother and whether this is not current. There is no indication or evidence when it would be current, whether in the foreseeable future or not.

Significant as well is not only her membership in the Pentecostal Church, but one must consider as well as other activities she has engaged in over and above just mere membership in that church. And by her testimony, she has volunteered to clean the church and, as well, has assisted by

cooking for workers who have been building this church. She has indicated either herself or her son contributed two or three occasions every week for the last few months. So in the Court's estimate, that there is a social and charitable aspect to her livelihood here in the United States.

Her only problems with the law have been two traffic tickets for speeding, which the Court does not consider significant. There is certainly no evidence of any drug or alcohol abuse.

She testified that her education in Romania had been hampered because of her membership in the Pentecostal Church, wherein she was prevented from attending school in the city beyond the 10th grade other than vocational training. Since her arrival she has completed high school, she has as well continued in that education by attending a pharmacy technician's course which she has indicated she is about half complete. She speaks English well, though during much of her testimony here, an interpreter was used.

So the question, I believe, having reviewed all these various factors, is does this rise to the level of extreme hardship. Now, if one were to look at any one particular aspect here that has been presented, the Court would be inclined not to find extreme hardship. But when one looks at this matter cumulatively with regard to each individual factor, the Court can think of no negative factors and no negative discretionary factors to have to account for. The Court does find, considering all of these various factors, that she would face extreme hardship, in particular because of her inability to freely practice her religion of choice without intimidation or harassment and, as well, the discrimination that she would be forced to suffer, along with her son, because of her prior marriage to a Hungarian. On balance the Court does find that

she has met the extreme hardship within the meaning of the Act and, as such, decides the exercise of discretion in her favor.

The applicant has listed the respondent, her son, Calin, as a derivative beneficiary of her suspension application pursuant to Section 203(a)(5)(C)(iii) of NACARA which provides "the spouse or child at the time a decision is rendered the deportation..." are those part of the structure of the Act, an individual eligible for suspension of deportation pursuant to a grant of such suspension to a parent or spouse. Additionally, pursuant to Section 203(a)(5)(C)(iv), I note that the respondent Calin in this case is under the age of 21.

Voluntary Departure

Respondent Calin was eligible for voluntary, but since his mother has been granted suspension of deportation, as derivative of his mother's claim, voluntary departure will not be discussed.

ORDERS

IT IS HEREBY ORDERED that the applicant's and respondent's application for suspension of deportation pursuant to NACARA is granted.

IT IS FURTHER ORDERED that the applicant's application for asylum and withholding of deportation is denied.

/s/_____
JOHN WALSH
Immigration Judge

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge
Detroit

Case No.: A 29-444-809

[Filed January 5, 1999]

In the Matter of:

HERMAN, DANFINA

APPLICANT IN EXCLUSION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on June 5, 1999. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in this case.

X Applicant's application for asylum was ( )granted (X)denied ( )withdrawn ( )other.

X Applicant's application for withholding of deportation was ( )granted (X)denied ( )withdrawn ( )other.

X Other: Suspension of Deportation NACARA - Granted

/s/_____
Immigration Judge
JOHN F. WALSH
Date: May 6, 1999

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-4111

Danfina Herman and Calin Paniti	)
Petitioner,	)
	)
v.	)
	)
JOHN ASHCROFT,	)
Attorney General	)
Respondent.	)
	)

WEIDEMAN & WEIDEMAN, P.C.
By: Carl M. Weideman, III (P 47032)
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PETITIONERS' FINAL BRIEF

[p.10]

The Court considered and rejected this argument, see pages 97 through 106 of the Transcript (Adm Rec pp 181 through 190, Jt App pp 158-167). Essentially, the thread of the Immigration Judge's conclusions were that the plain language of the statute indicated that Congress in their enactment of NACARA and other amendments to the Immigration and Nationality Act indicated the distinctions between exclusion and deportation proceedings were removed. Specifically, the Court cited Section 203(a)(5)(C)(i), "regardless of whether the alien is in exclusion or deportation proceedings." See page 8 of the Oral Decision (Adm Rec p 68, Jt App p 45). Ironically, Respondent twisted this same cite into a bar against HERMAN's application. This is illogical and ignores the facts of this case. HERMAN was found to have entered the United States in 1990 and filed her asylum claim before December 31, 1991, thus making her eligible under NACARA. Once the Judge makes this determination, it necessarily mandates that the departure was an incidental departure and the above quote renders the issue of whether she was in exclusion or deportation proceedings moot.

The Court found that in addition to the plain language of the statute, that to force an interpretation consistent with ***Torres***, supra, a pre-NACARA case, would be to find that Congress intended to punish those who lawfully request Advance Parole and favor those who successfully circumvent the law.

[p.11]

Further, the Court acknowledged that since Congress is presumed to be aware of the case law when it enacts a new statute and if it is contradictory, it is presumed to have intended to change the law. Accordingly ***Torres***, supra, is inapplicable to the present case.

The BIA sustained the Service's appeal on the basis of its differing interpretation of Petitioners' eligibility for relief under Section 203 of NACARA and Section 203(a)(5)(C)(iii) of NACARA.

[p.16]

in their favor through a straightforward approach to NACARA. Congress had passed a law which combined exclusion and deportation proceedings into a single action of removal. This was, inter alia, to eliminate the double standards regarding aliens facing proceedings which could result in their being forcefully ejected from the United States.

As two forms of proceedings were being combined, Congress chose to express eligibility for suspension of deportation under the transitional rules through the key phrase "regardless of whether the alien is in exclusion or deportation proceedings." NACARA Section 203 (a)(5)(C)(I).

The Immigration Judge seized upon this as a defining basis upon which to resolve the dilemma of rewarding the negative and punishing the positive. Congress, in its efforts to streamline the laws and to make them more fair, not less fair, expressed its intent to treat all people similarly situated (those facing expulsion) equally by establishing availability of the relief of suspension of deportation "regardless of whether the

alien is in exclusion or deportation proceedings." NACARA Section 203 (a)(5)(C)(I).

Finally, if lead Petitioner is eligible for relief under Section 203, her son is eligible under Section 203(a)(5)(C)(iii).